In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 183

HENRY LEONARD, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 8) has not been reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 9, 1928. (R. 11.) A motion for a new trial was seasonably made and overruled April 2, 1928. (R. 12.) The petition for certiorari was filed on June 8, 1928. (R. 12.) Jurisdiction to issue the writ is found in Section 3 (b) of the Act of February 13, 1925.

THE QUESTION

Petitioner, a major in the Marine Corps, was retired on September 30, 1911, because of wounds received in battle.

The question presented is whether his retirement pay should now be based upon the pay of a major at the time of his retirement plus longevity pay for the time since elapsed, as claimed by the Government and found by the court below; or

Whether it should be based upon the pay to which he would have become entitled under the Act of June 10, 1922, c. 212, 42 Stat. 625, had he remained continuously in active service and been retired after the passage of that Act.

The answer to that question depends upon the proper construction of that Act in connection with the Equalization Act of May 8, 1926, c. 274, 44 Stat. 417.

THE STATUTES

The Act of June 10, 1922, c. 212, 42 Stat. 625, provides pay periods for officers, and for an officer with the rank of major the base pay of these periods, so far as material, is:

Third period, $2,400 for less than 14 years' service.

Fourth period, $3,000 for more than 14 years' and less than 23 years' service.

Fifth period, $3,500 for more than 23 years' service.

Section 1 of the Act provides (p. 626):

> Nothing contained in the first sentence of section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922.
>
> For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay * * *.

Section 17 provides (p. 632):

> That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: *Provided*, That nothing contained in this Act shall operate to reduce the present pay of officers * * *. Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion: * * * Retired officers of the Army, Navy, Marine Corps, Coast Guard, and Coast and Geodetic Survey below the grade of brigadier general or commodore and retired officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances.

The Act of May 8, 1926, c. 274, 44 Stat. 417, provides that the retired pay of officers who were retired on or before June 30, 1922—

> shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service retired subsequent to that date: *Provided*, That nothing in this Act shall operate to reduce the pay of any officer or warrant officer now on the retired list.

STATEMENT

The petitioner was retired on September 30, 1911, on account of wounds received in battle. He was a major and at that time had 13 years, one month and 26 days of service to his credit. Thereafter, from time to time, he was assigned to active duty aggregating 4 years, 9 months and 21 days, so that on the 1st day of April, 1926, his entire active service had been 17 years, 11 months and 25 days. (R. 7.) At the time of his retirement the pay of a major was $3,000 a year (Act of May 11, 1908, c. 163, 35 Stat. 106, 108), and he was entitled as a retired officer to be paid 75 per cent of the pay of the rank upon which he retired. (R. S. 1274.) As the years went by this was increased 10 per cent for each five years of service. (R. S. 1262, the Longevity Statute.) This Court had held (*United States* v. *Tyler*, 105 U. S. 244) that under that section there was no distinction between active service and service on the retired list, and while Congress nullified that decision with respect to future longevity increases generally, it continued them for

officers retired on account of wounds received in battle (Act of March 2, 1903, c. 975, 32 Stat. 932), and Major Leonard belonged to that class.

The Act of June 10, 1922, *supra,* made no change in his pay, for section 1 said that nothing contained in the Act should authorize an increase in the pay of officers then on the retired list, and Section 17 said that nothing contained in the Act should operate to reduce it. No question arose until the passage of the Act of May 8, 1926, *supra.*

That Act required that his retired pay should not be less than that provided for officers "of equal rank and length of service retired subsequent to" the Act of 1922. When the Act of 1922 was passed he had to his credit over 17 years of active service (R. 6, 7) and over 23 years' service active and retired (R. 7). When the Act of 1926 was passed he had to his credit nearly 18 years of active service and over 27 years of combined active and retired service. His claim is that if he had been retired subsequent to the Act of 1922 his base pay since May 8, 1926, would have been $3,500 a year, that of an officer in the fifth pay period of more than 23 years' service. He has actually been paid during this period at the rate of $250 per month, representing the maximum pay of a retired major under the Act of May 11, 1908, which was *greater* than if he had been paid the base pay of a major of less than 14 years' service in the third pay period under the Act of June 10, 1922, and is the *same* as the base pay prescribed by that Act for a major of more

than 14 years' service in the fourth period. He has also been paid longevity pay as a major of 27 years' service by reason of being retired for wounds. (R. 7.)

If paid as a major entitled to credit for 27 years' service as a major in the fifth pay period, the difference from May 8, 1926, to March 31, 1927, would be $723.41.

ARGUMENT

The question involved is a narrow one and in its last analysis comes down to this: Did Congress by the Act of May 8, 1926, intend that an officer who had been on the retired list for many years should thereafter receive the same pay as he would have received had he spent those same years on the active list and then been retired under the Act of 1922? The Act does not justify such a construction.

The purpose of the Act of May 8, 1926, was to repeal that portion of Section 1 of the Act of June 10, 1922, which provided that nothing contained in that Act should authorize an increase in the pay of officers on the retired list on June 30, 1922. That provision represented a departure from the long continued policy of Congress to give officers upon the retired list the benefit of any legislation increasing the pay of officers of the rank held by retired officers at the time of their retirement. This is pointed out in the Report of the House Committee on Military Affairs recommending the passage of the Bill S. 1786, which became the

Act of May 8, 1926. (House Report No. 857, 69th Congress, 1st Session.) That report sets forth in full House Report No. 186 of the same Congress and session upon a House Bill which was identical with the Senate Bill which finally became law. The Report, referring to Section 1274 of the Revised Statutes, says:

> From this it will be noted that the pay of retired officers is not a fixed sum nor is it a specified sum, but it is seventy-five per cent of the pay of the rank upon which they are retired; that is, three-fourths of the pay of officers of similar rank still on the active list and not three-fourths of the pay of the date at retirement.

The Report then traces legislation beginning with the Act of March 2, 1867, and points out that originally provision had been made in Section 17 of the Act of June 10, 1922, for the equality of treatment of all retired officers regardless of the date of their retirement, thus adhering to the principle laid down in the Act of 1870, but explains that in conference a limitation was inserted which deprived all officers on the retired list of any benefit they might have received from the revised schedule. The Report mentions several instances in which unjust discrimination has resulted. One comparison is between a colonel retired in 1921 and another retired in 1922. The first officer's service was 30 per cent longer than the second, but the second officer's retired pay was 20 per cent greater than the first. The Report also contains a letter

from the Secretary of War recommending the passage of the Bill.

It seems clear that the purpose of the Act was to prevent such discrepancies by securing to an officer retired prior to June 30, 1922, the same pay to which he would have been entitled had he been retired thereafter, based upon the service which the statute said should then be computed in fixing the pay of an officer then retired, which, of course, would mean an officer on the active list, because only officers on the active list could be retired.

When Major Leonard was retired he had less than 14 years of service on the active list to his credit, and if he had been retired after July 1, 1922, with an equal amount of service to his credit, he would have been within the third pay period carrying a salary of $2,400 for less than 14 years' service; but as that Act forbade any construction of its terms which would reduce a retired officer's pay, he continued to be paid upon the basis of $3,000 a year, which was the same as the base pay of a major of over 14 years' service. (R. 7.) When the Act of June 10, 1922, took effect, though on the retired list, he had rendered additional active service, so that if he had then been retired with credit for that service he would have been within the fourth pay period carrying a salary of $3,000 for more than 14 years and less than 23 years' service, the rate at which he has actually been paid.

At all times since the Act of 1922 took effect his service combining active and retired has exceeded

23 years, so he claims that he is entitled to have his pay based upon the fifth period, $3,500 a year for more than 23 years' service, because the Act of 1922 says that for officers "in the service" on June 30, 1922, "there shall be included in the computation all service which is now counted in computing longevity pay." The answer to that is that the provision relates solely to officers on the active list.

When Congress said that nothing contained in the Act should authorize an increase in the pay of officers on the retired list on June 30, 1922, it can not be supposed that in the next sentence but one it was providing a method for increasing the pay for those officers. To give the language any meaning it must be referred to the context where Congress was dealing with the pay of officers on the active list. When, therefore, the Act of 1926 gave petitioner the right to pay not less than that of an officer retired subsequent to 1922, the comparison must be with officers then on the active list, for only such would be eligible for retirement. An officer on the active list would have had no service on the inactive list to his credit. So petitioner should be given no credit for such service. The Court of Claims held that he was entitled to credit for all active service performed while on the inactive list. Inasmuch as the base pay under which petitioner was retired, $3,000 a year, is the same as that of a major in the fourth pay period under the Act of

1922, it makes no difference under which Act he is paid.

Chief Justice Campbell, writing for the Court of Claims (R. 10), said:

> We think there can be no doubt that the officer should be credited with all active service before and after the date of his retirement.

Citing 5 Comptroller General, 1038. Though the soundness of that conclusion may be open to doubt, nevertheless it is probably what Congress intended, for by an Act approved May 26, 1928, Public No. 551, 70th Congress, Section 17 of the Act of June 10, 1922, was further amended to make the first sentence of that section read as follows:

> That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided by this Act, *which pay shall include increases for all active duty performed since retirement in the computation of their longevity pay and pay periods.*

The italicized words are those added by the Act of May 26, 1928. This Act shows, too, that Congress intended that only active service should count.

We think the sound construction of the statute results in giving the petitioner as the basis of his retired pay the benefit of all the active service which he has performed plus the increase in longevity pay while on the retired list. That is what he has received.

The Act of 1922 is entitled "An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Service," and seems to provide a complete and comprehensive readjustment of the whole subject of the pay of the personnel of all these services. It concludes by repealing all laws and parts of laws which are inconsistent or in conflict with its provisions. The Act makes provision for longevity pay at the rate of five per cent of the base pay of the officer's period for each three years of service up to thirty years. Upon this state of the law it is doubtful if the Act of March 2, 1903, giving officers retired on account of wounds received in battle credit for service on the retired list, is still in force. The compilers of the United States Code evidently thought that it had been repealed or superceded, for they did not include it in the Code.

The portion of Section 1 of the Act of 1922, quoted *supra*, is carried into the United States Code as Section 683 of Title 10. In place of the words contained in the Act—

> For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay—

the Code substitutes—

> For officers in the service on June 30, 1922, there shall be included in the computation all active duty performed while under

appointment or enlistment from the United States Government, whether in the regular, provisional, or temporary forces.

The explanation of the annotators is that the substituted words are from Section 127 (a) added to the Act of June 3, 1916, c. 134, by the amendment thereof by Section 51 of the Act of June 4, 1920, c. 227, subchapter 1. (U. S. Code annotated, Title 10, Sec. 683.)

Major Leonard, however, has been given credit for longevity increase for inactive service, and we are not questioning it. It is mentioned merely to show that amid the complexities and complications arising out of all this legislation, both the Department and the Court of Claims have been scrupulously careful to give him the benefit of everything to which his long and meritorious service entitles him which can be justified by any reasonable construction of the statute. The conclusion reached by the Court of Claims is, in our opinion, sound. (R. 11.)

> The act of 1922 prescribes pay periods and base pay for each; also it provides longevity pay for officers in the active service. Aided by the act of May 8, 1926, it regulates the pay of retired officers, but neither act authorizes the retired officer to go from one pay period into another solely because of length of time elapsing since his retirement. The advancement from one pay period to another can be based only on active service. The base pay of the fourth pay period is the

same amount as that prescribed by the act of May 11, 1908. The plaintiff is not entitled to the base pay of the fifth pay period, and having been paid as much as an officer retired subsequent to June 30, 1922, and of equal rank and length of service would receive, the petition should be dismissed.

CONCLUSION

The complexity of these statutes makes this case very involved. If we have not succeeded in showing that the decision below is right, the petitioner has likewise failed to satisfactorily demonstrate that it is wrong. Evidently the ruling of the court below is in accord with the construction of the statutes by officials whose duty it is to apply it, and if the result is not as Congress intended, clarifying legislation may be resorted to. The case is not such as to justify consideration by this Court on certiorari.

The petition for certiorari should be denied.

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AUGUST, 1928.

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